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05 UNITED STATES DISTRICT COURT  
06 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

07 WON-YOUNG CHOI, )  
08 Plaintiff, ) CASE NO. C11-5914-MAT  
09 v. )  
ORDER RE: SOCIAL SECURITY  
10 MICHAEL J. ASTRUE, Commissioner )  
of Social Security, )  
11 Defendant. )  
12 \_\_\_\_\_ )

13 Plaintiff Won-Young Choi proceeds in his appeal of a final decision of the  
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner  
15 denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an  
16 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative  
17 record (AR), and all memoranda of record, the Court finds this matter should be REVERSED  
18 and REMANDED for an award of benefits.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1958.<sup>1</sup> He has a college education and past work  
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22 <sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of  
Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 experience as a pharmacist. (AR 64, 72, 404.)

02 Plaintiff filed an application for DIB on February 24, 2006, alleging disability  
03 beginning February 28, 2005. He is insured for DIB through December 31, 2010. (AR 398.)  
04 Plaintiff's application was denied at the initial level and on reconsideration. Plaintiff timely  
05 requested a hearing.

06 On August 27, 2007, ALJ Charles S. Evans held a hearing, taking testimony from  
07 plaintiff, a vocational expert, and a medical expert. (AR 345-81.) On September 27, 2007,  
08 the ALJ issued a decision finding plaintiff not disabled under the Social Security Act at any  
09 time from the alleged onset date through the date of the decision. (AR 432-39.) Plaintiff  
10 timely appealed, first to the Appeals Council (AR 425-28), and then to the United States  
11 District Court, which reversed and remanded for further proceedings. (AR 411-15; *see also*  
12 AR 408-10).

13 ALJ Richard Say convened a second administrative hearing on June 18, 2010 and  
14 December 1, 2010, taking testimony from plaintiff, a medical expert, and a vocational expert  
15 (AR 551-70, 571-604.) On February 18, 2011, the ALJ issued a decision finding plaintiff not  
16 disabled. (AR 395-405.) The Appeals Council denied plaintiff's request for review on  
17 September 20, 2011 (AR 382-84), making the ALJ's decision the final decision of the  
18 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

### 19 **JURISDICTION**

20 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

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Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 **DISCUSSION**

02 The Commissioner follows a five-step sequential evaluation process for determining  
03 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
04 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had  
05 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be  
06 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's  
07 degenerative disc disease of the lumbar and cervical spine severe. The ALJ found non-severe  
08 plaintiff's left bicep tendonitis, possible osteoarthritis in the hands, knee pain, head and face  
09 contusion, elbow pain, mild insomnia, shoulder pain and limited range of motion, reports of a  
10 "frozen" shoulder and lower extremities, high blood pressure, and possible depression. Step  
11 three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ  
12 found that plaintiff did not have an impairment or combination of impairments that met or  
13 medically equaled one of the listed impairments in 20 C.F.R. Pt. 404, Subpt. P, App. 1.

14 If a claimant's impairments do not meet or equal a listing, the ALJ must assess residual  
15 functional capacity (RFC) and determine at step four whether the claimant has demonstrated an  
16 inability to perform past relevant work. The ALJ found plaintiff to have the functional  
17 capacity to perform at least sedentary work as defined in 20 C.F.R. § 404.1567(a) because of a  
18 limited tolerance for prolonged standing and walking. He can stand and walk for two or three  
19 hours in an eight-hour day and sit for at least six hours in an eight-hour day. He can lift and  
20 carry objects at the light exertional level, lifting and carrying up to twenty pounds occasionally  
21 and ten pounds frequently. He should never climb ladders, ropes, or scaffolds, and never  
22 crawl. He can occasionally climb ramps and stairs, stoop, kneel, crouch, and reach overhead.

01 He can frequently balance, and frequently handle, push and pull with his right (dominant) arm.  
02 He can occasionally push and pull with his left hand. He can continuously finger and feel. He  
03 can occasionally operate foot controls. Due to distraction caused by perceived pain, he is  
04 limited to semi-skilled activities. With that assessment, the ALJ found plaintiff unable to  
05 perform his past relevant work as a pharmacist, which requires prolonged standing and  
06 walking.

07 If a claimant demonstrates an inability to perform past relevant work, the burden shifts  
08 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make  
09 an adjustment to work that exists in significant levels in the national economy. With the  
10 assistance of a vocational expert, the ALJ found plaintiff capable of performing other jobs, such  
11 as hospital admitting clerk and pharmacy technician. As a result, the ALJ found plaintiff not  
12 disabled within the meaning of the Social Security Act at any time from the alleged onset date  
13 through the date of the decision.

14 This Court's review of the ALJ's decision is limited to whether the decision is in  
15 accordance with the law and the findings supported by substantial evidence in the record as a  
16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
17 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
18 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
19 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
20 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
21 F.3d 947, 954 (9th Cir. 2002).

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01 Plaintiff argues<sup>2</sup> that the ALJ erroneously concluded he is able to perform other work in  
02 the national economy at step five, contending he is disabled as a result of a number of medical  
03 conditions. Implicitly, he requests entry of an award of benefits. The Commissioner agrees  
04 the ALJ's decision was not free of legal error, requesting a sentence four remand for further  
05 proceedings. However, this Court agrees with plaintiff that the case should be remanded for an  
06 award of benefits.

07 Step Five

08 As required, the ALJ in this case employed the above-described five-step procedure for  
09 determining disability. 20 C.F.R. § 404.1520(a)(4)(i)-(v); *see also Valentine v. Comm'r*, 574  
10 F.3d 685, 689 (9th Cir. 2009). While plaintiff bears the burden of proof at steps one through  
11 four, the burden shifts to the Commissioner at step five "to show that the claimant can do other  
12 work." *Valentine*, 574 F.3d at 689 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.1988)).  
13 After completing step four of the sequential evaluation, the ALJ found plaintiff had established  
14 a prima facie case of disability, being unable to perform his past relevant work. To complete  
15 the process, the Commissioner posed a hypothetical to the vocational expert (VE) incorporating  
16 plaintiff's RFC, requesting an opinion on what kind of work could be performed by an  
17 individual with those limitations. The RFC included, *inter alia*, a restriction to only occasional  
18 reaching overhead. (AR 399, 597.)

19 The VE testified that he considered the positions of hospital admitting clerk and  
20 pharmacy tech, but both required frequent reaching. (AR 599.) Therefore, the positions

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22 <sup>2</sup> The Court acknowledges and appreciates the professionalism of the Special Assistant United States Attorney representing the Commissioner given the challenges of responding to the briefing of a *pro se* litigant.

01 considered would not be appropriate, and the VE testified he could not find other examples of  
02 occupations that would fit the limitations. (*Id.*) The ALJ found this testimony consistent with  
03 the information listed in the Dictionary of Occupational Titles (DOT). (AR 404.) However,  
04 in the decision, the ALJ retreated from the RFC finding and the hypothetical posed to the VE,  
05 finding as follows:

06       Although the vocational expert testified these occupations require frequent  
07       reaching, which might exceed the residual functional capacity, the claimant's  
08       complaints and self-described limits exceed the relatively mild conditions  
09       shown in the objective medical evidence and Dr. Duckler's testimony.  
10       Considering the lack of objective evidence to support several of claimant's  
11       allegations, e.g., frozen shoulder and knees and the lack of treatment despite his  
12       access to VA facilities, it is determined that these occupations do not exceed  
13       claimant's functional capacity at any time through the date last insured.

14 (AR 404-05.)

15       This conclusion lacks the support of substantial evidence. As the Commissioner notes,  
16       the hypothetical posed to the VE "must set out *all* the limitations and restrictions of the  
17       particular claimant[.]" *Magallanes*, 881 F.2d 747, 757 (9th Cir. 1989) (citing *Embrey*, 849  
18       F.2d at 422) (emphasis in original). Here, the hypothetical included a restriction on more than  
19       occasional reaching. (AR 597.) Moreover, the RFC adopted by the ALJ included the same  
20       restriction. (AR 399.) Finding the only available jobs exceeded plaintiff's RFC, the ALJ did  
21       not change the RFC, but instead attempted to shoe-horn plaintiff's functional capacity into the  
22       requirements of the jobs. The Commissioner "concedes error that there is an inconsistency  
23       between the plaintiff's RFC and the requirements of work identified at step five." (Dkt. 22 at 6.)

24       Further, the ALJ's step five finding creates a conflict between the VE testimony and the

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01 DOT. The VE testified<sup>3</sup> the DOT description of the hospital admitting clerk (DOT  
02 205.362.018) and pharmacy technician (DOT 074.382.010) required frequent reaching. (AR  
03 599-600.) The ALJ found, “after careful consideration of the entire record”, that plaintiff was  
04 restricted to occasional lifting. (AR 399.) Nevertheless, the ALJ found that plaintiff could  
05 perform the jobs of hospital admitting clerk and pharmacy technician. (AR 404-05.) The  
06 ALJ did not address this inconsistency. An ALJ has an affirmative responsibility to inquire as  
07 to whether a VE’s testimony is consistent with the DOT and, if there is a conflict, determine  
08 whether the VE’s explanation for such a conflict is reasonable. Social Security Ruling (SSR)  
09 00-4p; *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007).

#### 10 Remand

11 The Commissioner asks this Court to remand the case for further proceedings so that the  
12 ALJ can clarify the inconsistency between the ALJ’s RFC and the requirements of the jobs  
13 identified at step five. The Court has discretion to remand for further proceedings or to award  
14 benefits. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). Remand for further  
15 administrative proceedings is appropriate if enhancement of the record would be useful.  
16 *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) (citing *Harman v. Apfel*, 211 F.3d 1172,  
17 1178 (9th Cir. 2000)). Conversely, where the record has been developed fully and further  
18 administrative proceedings would serve no useful purpose, the district court should remand for  
19 an immediate award of benefits. *See Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996).

20 At step five, the Commissioner has the burden of proving plaintiff retains the capacity to  
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22 <sup>3</sup> The testimony was not “somewhat equivocal” as suggested by the Commissioner, but quite unequivocal. (AR 599-600.)

01 make an adjustment to work that exists in significant levels in the national economy.  
02 *Valentine*, 574 F.3d at 689. The Commissioner failed to meet that burden, conceding the lack  
03 of substantial evidence support for the step five finding in this case.

04 The Court finds no useful purpose would be served by remanding this case for a third<sup>4</sup>  
05 administrative hearing. To date, plaintiff has waited over six years for his disability  
06 determination, and the matter has already been once remanded. The fact that additional  
07 proceedings would pose further delay weighs additionally in favor of an award of benefits.  
08 *See, e.g., Varney v. Secretary of Health and Human Servs.*, 859 F.2d 1396, 1398-99 (9th Cir.  
09 1988) (noting claimant had already waited over five years since applying for benefits;  
10 “Delaying the payment of benefits by requiring multiple administrative proceedings that are  
11 duplicative and unnecessary only serves to cause the applicant further damage -- financial,  
12 medical, and emotional.”)) The ALJ’s RFC finding and the vocational testimony establish that  
13 no jobs exist in substantial numbers in the national economy that plaintiff can perform.  
14 Therefore, a finding of “disabled” is compelled.

15 **CONCLUSION**

16 For the reasons set forth above, this matter is REMANDED for an award of benefits.

17 DATED this 8th day of June, 2012.

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19 Mary Alice Theiler  
20 United States Magistrate Judge

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4 Counting the June 18, 2010 partial hearing (AR 551-70), a remand for further proceedings  
would actually result in a fourth hearing.